APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

HARRY A. REOUX, *Respondent,*

v.

THE FIRST NATIONAL BANK OF GLENS FALLS, as Executor of the Estate of Adelia H. Reoux, Deceased, *Appellant.*

PER CURIAM:

The order should be reversed with costs in all courts and judgment of the Supreme Court, Warren County, entered December 3, 1957, in favor of defendant insofar as it grants recovery on the counterclaim should be reinstated. The law of the case is that plaintiff, Harry Reoux, acting as both an attorney and as a son, had the burden of establishing by "clear and satisfactory" evidence that the transfer of the securities in question was a "valid and voluntary gift" on the part of his mother, a burden which he failed to meet (3 A D 2d 560, affd. 4 N Y 2d 1022).

The newly discovered evidence consisted only of the will dated Nov. 9, 1953, disinheriting plaintiff and a letter of even date explaining the disinheritance. These documents in no way refute plaintiff's own admissions of undue influence and overreaching, nor do they reveal any donative intent on the part of the mother as to the securities in question.

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Order reversed with costs in all courts and judgment of Supreme Court, Warren County, entered December 3, 1957 in favor of defendant on the counterclaim reinstated insofar as it grants recovery thereon.

Opinion Per Curiam. All concur; Bergan, J. taking no part.

APPENDIX B

Decision of Appellate Division.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

July 7, 1964.

HARRY A. REOUX, *Respondent*,

v.

THE FIRST NATIONAL BANK OF GLENS FALLS, as Executor of the Estate of Adelia H. Reoux, deceased, *Appellant*.

6371

PER CURIAM:

Defendant executor appeals from a judgment of the Supreme Court after a trial before the court without a jury.

In 1954 respondent sued his mother to compel her to complete the transfers to him of certain stock certificates which he had removed from a safe deposit box with her permission. The gravamen of his complaint was that the transfers in question stemmed from an oral agreement between him and his parents made in 1924 whereby he would receive one-half of their estates in consideration of his returning to Warrensburg after graduation from law school for the purpose of looking after their substantial business interests. Defendant mother counterclaimed for a judgment directing the return to her of other securities of the value of about $40,000 which had been reregistered in her son's name following their alleged gift to him on the 18th and 19th days of September, 1953. After a trial of the issues the late Mr. Justice Heffernan, acting as official referee, reported in favor of plaintiff. The Supreme Court confirmed his recommendation and directed defendant to execute the indorsements and assignments which he sought to compel.

Upon appeal we reversed, dismissed the complaint and granted judgment on the counterclaim (3 A. D. 2d 560). In effect we held that Reoux, acting in the confidential capacities of attorney and son, had overreached his mother in respect to the securities involved in both the claim and the counterclaim. We also said that plaintiff had not proved the agreement which we did not regard as the real issue and that in any case defendant by the terms of a will dated July 21, 1953 wherein she divided her residual estate between the plaintiff and his sister had substantially complied with any alleged agreement.

Mrs. Reoux died in 1958. A will dated November 9, 1953 in which she gave the residue of her property to a daughter and her children was admitted to probate following a trial of the objections interposed by plaintiff. This will was drawn by an attorney who had not previously represented her and who at the same time and at her direction had drafted a letter which read: "November 9, 1953. The First National Bank of Glens Falls, Glens Falls, New York. Gentlemen: By my Will of this date, I have made no provision for my son, Harry Reoux. My reason for this action is that I have made transfers of securities to him in my lifetime which, with his other assets, should adequately provide for him and his family. I have reached this conclusion without suggestion from anyone and as a result of considerable thought on my part. Very truly yours, Adelia H. Reoux." He also testified at the trial of the will contest: "Furthermore, she [testatrix] stated that she did not want to make any provision for her son Harry; that she had made various transfers of securities, investments and assets to him and she felt he was well provided for. * * * She told me that, again, she didn't want to leave anything to Harry, and expressed the same reasons that she had before, namely, that he was well provided for, and that she had made previous gifts to him, I gather in substantial amounts." The proof in the probate proceeding further disclosed that in August, 1954 defendant wrote her

son in reply to his letter concerning the stock certificates which were the basis of the complaint as follows: "August 2, 1954 Dear Harry: I have received your registered letter demanding that I turn over all of my stocks to you. You told me last winter that the paper you had me sign was for the Imperial and other stocks that I gave you last fall. I never intended giving you any more of my stock than you already had and I am not going to give you any more. Mother."

Upon a showing of these facts we granted plaintiff's motion for a new trial of the counterclaim in the interest of justice (16 A. D. 2d 543). Trial term has determined that the transfer of the securities by decedent to plaintiff in September, 1953 was intended to be a gift and that such was freely and voluntarily made. His decision is grounded principally on the probative force of the letter of November 9, 1953 corroborated by the subsequent letter of August 2, 1954 and the circumstances in which both were written.

Appellant contends that plaintiff's testimony on which defendant initially prevailed in this court requires the same conclusion now. This view overlooks the evidence newly discovered after the first trial consisting of the November 9 will, the testimony of its draftsman, the letter of the same date, the subsequent one dated August 2, 1954, and the evidence of deceased's testamentary capacity, all adduced for the first time at the trial of the will contest which, of course, postdated our prior decision. We think that the trier of the fact could find that this additional proof was sufficient to tip the scale in plaintiff's favor and on the record as now constituted that he had sustained the burden of proof cast upon him by reason of the confidential relationship which existed between him and his mother.

Judgment affirmed, with costs.

Herlihy, J. P., Reynolds, Taylor, Aulisi and Hamm, JJ., concur.

APPENDIX C

Opinion at Special Term.

STATE OF NEW YORK, SUPREME COURT,
WARREN COUNTY.

HARRY A. REOUX, *Plaintiff*,

v.

THE FIRST NATIONAL BANK OF GLENS FALLS, as Executor of the Estate of Adelia H. Reoux, deceased, *Defendant*.

Special Term:

Warren County Courthouse, Lake George, N. Y., January 2nd and 3rd, 1963.

Appearances:

Wood, Morris, Sanford & Hatt, Attorneys for defendant, 90 State Street, Albany, New York.

John S. Hall, Esq., Attorney for plaintiff, James C. Straney, Esq., of counsel.

SWEENEY, J.:

This is a retrial of an action which was originally commenced in August of 1954 by the plaintiff, an attorney, against his mother to compel her to transfer to him certain securities which he removed in September of 1953, with her permission, from the mother's safe deposit box at the Emerson National Bank in Warrensburg, New York. The plaintiff retained these securities, but they were not endorsed by the mother. The latter, in her answer after making certain denials to the complaint, interposed a counterclaim, demanding the return to her of certain other securities removed at the same time as those mentioned in the complaint. These securities, the mother had endorsed

and they were subsequently registered in the name of the plaintiff.

The mother died in 1958, subsequent to the original trial. Her will was contested and it resulted in a jury trial held in Supreme Court in Warren County in the Fall of 1959. Subsequently, the plaintiff sought a new trial of the original action because of newly discovered evidence brought out during the will contest. This newly discovered evidence consisted of a letter written by the mother the same day on which the will offered for probate was executed. The Appellate Division in *Reoux* v. *Reoux*, 16 A. D. 2d 543, granted a new trial. The new trial, however, related solely to the counterclaim. The First National Bank of Glens Falls, as Executor of the Estate of the mother has been substituted as defendant.

The retrial consisted mainly of reading into evidence excerpts of testimony of witnesses who testified at the original trial and in the will contest. Some of the testimony adduced at the first trial was not produced at this trial. In addition, there was proof offered at the present trial which was new. I am confined to the proof presented at the new trial, together with certain rulings of law which the Appellate Division had previously made and which were conceded to be the law of the case. The Appellate Division, in granting the new trial, took great pains to point out that any observations made by it in granting the new trial were not determinative of the issues upon a retrial. Consequently, the result of the retrial depends upon the conclusions reached by me as the trier of the facts from all of the proof presented at such retrial.

Defendant contends that the proof produced on the retrial indicates that the transfer of the stocks in question did not constitute a gift freely and voluntarily made, but resulted from the influence and coercion exerted by the plaintiff upon his aged mother while he was acting in a son-mother, lawyer-client relation with her. Defendant

further maintains that the letter of November 9, 1953 which accompanied the execution of the will of that date and which was the newly discovered evidence upon which the Appellate Division granted a new trial, does not debilitate its contention.

Plaintiff contends that the transfer of the securities in question was voluntarily and freely made. He further maintains that the letter of November 9, 1953 not only supports this contention, but also re-affirms the original gift.

The sole question to be determined is whether or not the proof offered on the retrial is sufficient to establish a free and voluntary gift of the securities in question.

Since we are dealing solely with the counterclaim, the burden is on the defendant to prove that the securities in question were not voluntarily given, but that the transfer was in fact made involuntarily because of fraud and duress. I should add, however, that due to the confidential relationship of the parties, it would require little proof to shift this burden to the plaintiff and place on him the onus of establishing that the transfer was freely made.

There appears from the testimony that up to a certain time, the defendant-mother had contemplated leaving the residual of her estate to the plaintiff and the plaintiff's sister. A will executed as recently as of July 21, 1953 followed this pattern. There is also evidence in the record that subsequent to the death of the father in 1938 the defendant-mother made gifts to both her son and daughter. During these years the plaintiff often acted as attorney for his mother. He was not the sole attorney, however, for the will which was ultimately admitted to probate was drawn by another attorney. The record also indicates that the plaintiff's sister's husband, an attorney, represented the defendant-mother from time to time.

There came a time in September of 1953 when the plaintiff learned that his mother had made substantial gifts of

securities to his sister. At about this time the securities in question were removed from the safe deposit box with the mother's written permission, and shortly thereafter, they were endorsed to the plaintiff by the mother. At this particular time, the mother was recuperating from a recent illness and was residing with the plaintiff. Soon thereafter, she left plaintiff's residence to reside with the sister. It was during the period that she was residing with the sister that the sister's attorney husband took the mother to an independent attorney to have the will drawn which ultimately turned out to be the one which was admitted to probate. This will was executed on November 9, 1953. This was some two months subsequent to the time the mother endorsed the securities in question to the plaintiff. On this very date the mother wrote a letter explaining why she did not make any provision in the will for the plaintiff-son. This letter is the chief reason for the Appellate Division's granting the new trial. The letter reads as follows:

> "November 9, 1953. The First National Bank of Glens Falls, Glens Falls, New York. Gentlemen: By my Will of this date, I have made no provision for my son, Harry Reoux. My reason for this action is that I have made transfers of securities to him in my lifetime, which with his other assets, should adequately provide for him and his family. I have reached this conclusion without suggestion from anyone, and as a result of considerable thought on my part. Very truly yours, Adelia H. Reoux. Witnesses: B. W. Francis, A. D. Clark."

On August 2, 1954, the mother also wrote a letter to the plaintiff in reply to one he had written her. These two letters, plus the new will, viewed as a whole, are most significant. The August 2nd letter reads as follows:

> "August 2, 1954. Dear Harry: I have received your registered letter demanding that I turn over all of my

stocks to you. You told me last winter that the paper you had me sign was for the Imperial and other stocks that I gave you last fall. I never intended giving you any more of my stock than you already had and I am not going to give you any more. Mother."

This latter letter refers to certain stocks that the mother had transferred to the plaintiff, including the Imperial stock which is involved in the counterclaim, and it states that they were given "last fall", which would be the fall of 1953, the time when the plaintiff contends the stocks in question were given to him.

I conclude that the letter of November 9, 1953 indicates that the mother was aware that she had transferred these securities to the plaintiff-son and intended them as a gift. On that day there could have been no influence exerted on behalf of the plaintiff. He was not there. On the contrary, the sister was present. The will made on this same day was drawn within two months after the transfer in question. In so far as the son was concerned, it was totally inconsistent with this previous will because it made no provision for plaintiff. This leads me to conclude that the mother intended the September, 1953 securities transfer to be the manner in which she was providing for her son. This conclusion is further substantiated by the testimony of the attorney who prepared this final will and who testified that he understood the mother had made previous substantial gifts to the son.

This conclusion I reach is further corroborated by the letter of August 2, 1954. Here again the mother is not under the influence of the plaintiff. She is making her home with the sister. She refers to the transfer of the stock in question, specifically mentioning the Imperial stocks as the stocks "I gave you last fall" (1953). How easy it would have been for her to say, "You took these stocks from me and I want them returned," or "I never intended you to have them". It appears to me her in-

tention was just the opposite. She had, since the transfer of these stocks in September, 1953, performed three separate and distinct acts which, when taken together and examined in light of all the circumstances, strongly indicate to me that she desired the plaintiff to have the securities in question. First, she engaged a disinterested lawyer and prepared a new will by which she left nothing to the plaintiff-son. Secondly, she carefully explained this act to the Executors, and finally, she wrote the letter of August 2, 1954, again referring to the securities, some of them by name, as gifts.

I conclude therefore, from all of the proof and particularly these last mentioned acts, two of which were done with the aid of counsel and all of which were done at a time when she was not under the control of the plaintiff, that the mother, in her own mind, had finally straightened out once and for all the disposition of her property and intended to let the matter end there.

In summary, I conclude on this record that the transfer of the securities to plaintiff in September of 1953 was intended to be a gift, and further that it was freely and voluntarily made.

At the trial defendant objected to the admission of certain proof on the ground that SECTION 347 OF THE CIVIL PRACTICE ACT WAS VIOLATED. There were several such incidents. The defendant had a continuing objection and the Court, in each case, reserved. I now sustain the objection. I did not consider this testimony in my decision.

Counterclaim dismissed on the law and on the facts.

The above constitutes the signed decision upon which judgment may be entered, in accordance with Section 440 of the Civil Practice Act.

Dated: June 29th, 1963.

MICHAEL E. SWEENEY
J. S. C.

APPENDIX D

16 A.D.2d 543

HARRY A. REOUX, *Appellant*,

v.

THE FIRST NATIONAL BANK OF GLENS FALLS, as Executor of the Last Will and Testament of Adelia H. Reoux, deceased, *Respondent*.

Supreme Court, Appellate Division, Third Department.

June 28, 1962.

* * * * * * * * * * *

James Clayton Straney, Latham, for plaintiff-appellant.

Morris, Dillon & Schrade, Albany (Ernest B. Morris, Albany, of counsel), for defendant-respondent.

Before BERGAN, P. J., and COON, GIBSON, HERLIHY and REYNOLDS, JJ.

PER CURIAM.

The action concerned a dispute between the plaintiff and his mother regarding the validity of certain alleged transfers of various stock certificates. Such issues, as relate to the complaint itself, are not before the court on this motion, and we accordingly direct our attention to the facts having to do with the counterclaim.

The record shows that subsequent to the death of the husband and father of the parties, a well defined testamentary plan was established by the mother to treat her son and daughter on equal terms. In 1953 this pattern changed and arguments arose which resulted in bitter and protracted litigation, of which this action is a facet.

In July of 1953, while the defendant mother was residing in a nursing home, she executed a Will which plaintiff had prepared. Following the pattern of former Wills, the residue was divided equally between her plaintiff son

and daughter. In September, while living at the home of the plaintiff, she transferred to him certain certificates of stock which were the basis for the counterclaim. In November, having left the home of her son and returned to the home of her daughter, she had a new Will drawn by an attorney who had not previously represented her and which Will, dated November 9, 1953, left the residue to her daughter and her heirs. At the same time she had the attorney draft a letter, which is the basis for this motion. The letter reads as follows:

> "November 9, 1953, The First National Bank of Glens Falls, Glens Falls, New York. Gentlemen: By my Will of this date, I have made no provision for my son, Harry Reoux. My reason for this action is that I have made transfers of securities to him in my lifetime, which with his other assets, should adequately provide for him and his family. I have reached this conclusion without suggestion from anyone, and as a result of considerable thought on my part. Very truly yours, Adalia H. Reoux. Witnesses: B. W. Francis, A. D. Clark."

The plaintiff alleges he first had knowledge of this letter on October 27, 1959, after the death of his mother and long subsequent to our original decision, dated May, 1957.

The decision of this court made no distinction between the cause of action alleged in the complaint and the cause of action alleged in the counterclaim.

On the original trial of this action, the plaintiff attempted to prove a binding agreement between him and his mother and father whereby he was to receive one-half of their estate. We said that if there had been any agreement, as alleged by the plaintiff, the Will of July, 1953 substantially carried out the terms thereof. We further determined that there had been overreaching and the violation of a confidential relationship on the part of the plaintiff. The

Referee had refused to make such findings as to the counterclaim.

[1] The question then is: If the letter, which is the basis of this motion, had been before the court at the time of its original decision, what effect would it have had on the said decision? To grant a new trial, under the circumstances herein, there must be a showing that the evidence is material as to the merits of the case and that it is reasonable to suppose that the conclusion of the court would have been otherwise if this evidence had been before it at the time of its decision. Cassab v. Hees, 261 App.Div. 1115, 27 N.Y.S.2d 179.

This court said that plaintiff proved no agreement between the plaintiff and the defendant bearing upon the equal distribution of the defendant's property between her children in her lifetime, but the court then held that, in any event, the defendant had substantially complied with any alleged agreement respecting the division of her estate by the terms of the Will of July 21, 1953, wherein she divided her residual estate between the plaintiff and his sister. A finding* to that effect was made at the request of the defendant who knew that a new Will leaving everything to the daughter and her family and the letter of explanation, the subject of this motion, had been executed by her on November 9, 1953. While the findings of this court were warranted by the record as then constituted, they were, as disclosed by subsequent events, erroneous. We said the alleged oral agreement was not the real issue involved and accordingly, the decision relating thereto might be considered dictum. However, the determination of that issue may have influenced the decision of this court. It follows that, in the interest of justice, the finding, while not controlling, must be given consideration in determining the motion.

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*"11. If any such oral agreement was made in 1924, defendant subsequently complied with that agreement by the Will set forth in full in the record, which she made on June (sic) 21, 1953".

The basic reasons for this court's dismissal of the counterclaim were findings that a confidential relationship existed between the parties and that the acts of the plaintiff, under the circumstances, amounted to undue influence and overreaching on his part. After permitting a reargument, this court adhered to its original decision (4 A.D.2d 805, 165 N.Y.S.2d 722).

It is not disputed that at the time the letter of November 9, 1953 was written, the defendant was not under the influence of the plaintiff. The attorney, who prepared the letter, testified at a subsequent will contest trial: "Furthermore, she stated that she did not want to make any provision for her son Harry; that she had made various transfers of securities, investments and assets to him and she felt he was well provided for." Further, he stated: "She told me that, again, she didn't want to leave anything to Harry, and expressed the same reasons that she had before, namely, that he was well provided for, and that she had made previous gifts to him, I gather in substantial amounts." These statements, together with the additional testimony offered as to the testamentary capacity of Mrs. Reoux, affirm the fact that if she were competent to make the Will of November 9, 1953, she was equally competent on the date to "reaffirm" the transfer of securities, the subject matter of the counterclaim. It seems apparent that the defendant realized that the Will of November 9th was a substantial departure from the pattern previously adhered to and the letter of the same date was an explanation for the change, to wit, that she had transferred to plaintiff securities within a relatively short period of time.

Subsequently in August, 1954, when the plaintiff wrote to the defendant concerning the stock certificates, which were the basis of the complaint, she replied as follows:

> "August 2, 1954 Dear Harry: I have received your registered letter demanding that I turn over all of my stocks to you. You told me last winter that the paper

you had me sign was for the Imperial and other stocks that I gave you last fall. I never intended giving you any more of my stock than you already had and I am not going to give you any more. Mother."

This letter was written while defendant was living with her daughter and when read in context with the letter of November 9, 1953 would seem to be a further reaffirmance of the gift of the subject matter of the counterclaim. It appears undisputed in the present record that the only securities given to the plaintiff by the defendant prior to September, 1953 totaled $9,500.00.

Without the letter of November 9, 1953 and the conversations of the attorney who prepared the letter quoted above, the letter of August 2, 1954 would not have the same impact. It is undisputed that the Imperial stock had been given by the defendant to the plaintiff in September, 1953 and was one of the stocks sought to be recovered in the counterclaim.

[2] The letter, which is the basis for this motion, might, upon a new trial, lead to a different result. It is of strong probative force and tends to contradict the testimony of Mrs. Reoux concerning the transfer of securities. On a motion of this kind, of necessity we must make observations as to the purported new evidence, but such observations are not to be considered as determinative of the issues upon a retrial. Upon a new trial, the introduction of the letter might conceivably have no effect or it might be determined from it that there was no overreaching or that if there had been overreaching, the letter, written when the defendant was under no force or duress, was intended to forgive any acts of the plaintiff and to reaffirm the gift of the stock certificates. It is our considered opinion, that where such doubt exists, it constitutes the basis for the granting of a new trial within the framework of the rule enunciated in Collins v. Central Trust Co. of Rochester, 226

App. Div. 486, at page 488, 235 N.Y.S. 511, at page 515, where the court said:

> "The fundamental and underlying test to be applied to motions of this character is whether the newly discovered evidence is of such a nature, and is so positive and convincing, that it will, in all probability, produce a different result, if a new trial is had."

We recently granted a new trial, in the interest of justice, where there was some doubt as to whether plaintiff had knowledge of an alleged material witness, known to both defendants, but who failed to produce the witness at the trial. Brinkman v. Brinkman, 15 A.D.2d 587, 221 N.Y.S. 2d 836. Here, we have documentary evidence in the possession of the defendant, but not within the knowledge of the plaintiff at the time of the original trial and not before this court on the appeal therefrom.

In Hyman v. Dworsky, 239 App.Div. 413, at page 419, 267 N.Y.S. 539, at page 546, this court said: "Newly discoverd evidence contradicting the evidence of a witness upon a material issue is in general sufficient ground for applications of this sort."

The executor further contends that the motion should be denied because of the laches of the plaintiff. Concededly there was considerable delay between the time the plaintiff first acquired knowledge of the letter and the motion for a new trial, but because of the unusual and exceptional circumstances alluded to and in the interest of justice, we are constrained to overlook the delay.

In Harago v. Commonwealth Bank, 136 Misc. 735, 739, 240 N.Y.S. 430, 435, Mr. Justice Frankenthaler observed:

> "But even if he has not moved in the matter with diligence, his case is one in which the interests of justice require a new trial. Frohlich v. Zeltzer, 185 App.Div. 103, 110, 173 N.Y.S. 15, [18]. The comments of the court in Platt v. Munroe, 34 Barb. 291,

294, are quite appropriate here: 'The books are full of exceptional cases, in which development of truth and the promotion of substantial justice have been deemed sufficient reasons for granting new trials, although they were not within any former precedent, and consequently not within the operation of any principle or rule established for the guidance of the courts in the exercise of their discretion.' "

See also: Schnur v. Cohen, 152 Misc. 676, 273 N.Y.S. 996; Stephens v. Stephens, 5 A.D.2d 962, 171 N.Y.S.2d 729; Brinkman v. Brinkman, 15 A.D.2d 587, 221 N.Y.S.2d 836.

It has been aptly stated that "rules of law are intended to serve and not to frustrate the ends of justice". Schnur v. Cohen, supra, page 678, 273 N.Y.S. page 999.

The litigation involving the Reoux family has multiplied into many facets and forms and there should be finality to it all without further delay. Courts do not sanction such long and protracted litigation, especially between members of a family, and the issues hereto should be determined forthwith by way of an amicable settlement or a speedy trial.

We determine that, in the interests of justice, the motion for a new trial should be granted.

The order of Special Term should be reversed, on the law and the facts, and the motion for a new trial granted, with costs to abide the event.

Order of the Special Term reversed, on the law and the facts, and motion for new trial granted, with costs to abide the event.

Within the terms of the stipulation heretofore filed the case is referred to Hon. Harry E. Schirick, Official Referee, to hear and determine.

BERGAN, P. J., GIBSON and HERLIHY, JJ., concur.

COON and REYNOLDS, JJ., dissent and vote to affirm.

APPENDIX E

HARRY A. REOUX, *Appellant*,

v.

ADELIA H. REOUX, *Respondent*.

Argued May 9, 1958; decided June 25, 1958.

[Reporter's Summary, 3 N.Y.2d 940]

APPEAL from a final judgment of the Supreme Court in favor of defendant entered December 3, 1957, in Warren County upon a report of a referee (John J. Conway, Ref.), following an order of the Appellate Division of the Supreme Court in the third judicial department which (1) reversed, on the law and facts, a judgment of the Supreme Court in favor of plaintiff, also entered in Warren County upon a decision of an Official Referee (Christopher J. Heffernan, Off. Ref.), (2) dismissed the complaint, (3) granted judgment to defendant on her counterclaim, and (4) directed plaintiff to account for any sales of securities and any dividends or interest. Stated findings of fact and conclusions of law contained in the decision of the Official Referee were reversed and new findings and conclusions made by the Appellate Division in lieu thereof. The action was commenced to compel defendant to complete, by the execution of assignments, a transfer to plaintiff of shares of stock and bonds owned by defendant. Plaintiff alleged in the complaint that the transfer was effected by an agreement in writing dated April 1, 1954. In his bill of particulars, plaintiff alleged that the consideration for the agreement was another agreement made by defendant and her then husband in 1924, whereby in exchange for the rendition of legal and other services by plaintiff, their son, to them they agreed to give plaintiff and his sister half of their estate. By her answer, defendant alleged that her signature to the agreement of April 1, 1954 was obtained by fraud while she was convalescing from a serious illness.

By a counterclaim, defendant alleged that she was 81 years of age, that in September, 1953 she was recovering from a stroke, that she owned certain shares of stock and certain bonds kept in a safe-deposit box in a bank in Warrensburg, that defendant was coerced into authorizing plaintiff to enter her safe-deposit box, that thereafter she was forced to transfer certificates of shares of named stocks different from those referred to in the complaint to him, that when she left plaintiff's home in November, 1954 she discovered that plaintiff had taken all her securities, and that plaintiff refused to return them. She demanded a declaration that the agreeemnt of April 1, 1954 was void, and that the transfer of the shares of stock mentioned in the counterclaim was void, that plaintiff return all her securities and that plaintiff account for dividends and the value of any stocks he was unable to restore. Defendant's will, executed on July 21, 1953, divided her residuary estate equally between plaintiff and his sister. The appellate Division stated that: "The real issue is whether plaintiff, acting both as an attorney and as a son, obtained from his mother the possession of stocks and bonds under circumstances that amounted to undue influence and overreaching on his part. We cannot find from the record any evidence that defendant was legally obligated to transfer to the plaintiff any of the securities involved in either the plaintiff's claim or the counterclaim of the defendant, and such being the case the transfers involved take on the aspect of gifts. * * * Where a confidential relationship exists between parties a valid gift must be established by evidence that is clear and satisfactory. * * * He * * * was bound by the highest punctilios of honor, in view of the fact that he was acting for the defendant both as her son and as her attorney, to see to it that the defendant was meticulously advised as to her rights and duties. That burden became his from the very nature of the confidential relationship that existed between them, and especially so in view of her age and condition. * * * he failed to sustain

that burden. By his own admission he advised her on several occasions that there was a valid and subsisting agreement on her part to convey to him one half of her property. There is no indication that he limited this advice to the proposition that she had agreed to make a will in his favor."

M. James Conboy and Edward L. Bookstein for appellant.

Ernest B. Morris and John R. Davison for respondent.

Judgment affirmed, with costs; no opinion.

Concur: Chief Judge Conway and Judges Desmond, Dye, Fuld, Froessel, Van Voorhis and Burke.

APPENDIX F

Opinion for Reversal

SUPREME COURT, APPELLATE DIVISION—THIRD DEPARTMENT

HARRY A. REOUX, *Plaintiff-Respondent,*
against
ADELIA H. REOUX, *Defendant-Appellant.*

Argued March, 1957.

Decided April, 1957.

Before:
Hon. Sydney F. Foster, Presiding Justice,
Hon. Francis Bergan,
Hon. William H. Coon,
Hon. Philip Halpern,
Hon. James Gibson, Associate Justices.

Appeal from a judgment of the Supreme Court, entered upon the decision of an official referee (Heffernan, O. R.), which directed defendant to endorse or assign certain stock and bond certificates, and dismissed her counterclaim for the return of certain stocks.

McPhillips, Fitzgerald & McCarthy, Attorneys for Plaintiff-Respondent, Office and P. O. Address, 286 Glen Street, Glens Falls, New York (C. E. Fitzgerald and Thomas J. McCarthy, of Counsel).

Morris, Dillon & Mac Harg, Attorneys for Defendant-Appellant, Office and P. O. Address, 91 State Street, Albany, 7, New York.

Per Curiam.

Defendant appeals from a judgment of the Supreme Court, entered upon the report of an official referee, which directed defendant to deliver to the plaintiff endorsements or assignments of certain stocks and bonds, said to have an approximate value of $45,000, which were included in a bill of sale executed by the defendant on the 1st day of February, 1954. The judgment also dismissed a counterclaim of the defendant which sought a judgment directing plaintiff to return to her certain other securities said to have an approximate value of $40,000.

Plaintiff is a lawyer and son of defendant. It is his contention that the transfers in question stemmed from an oral agreement made in 1924, between him and his parents by which the latter agreed that upon the death of either or both of them he would receive one-half of their estates in consideration for his services in looking after their business interests and properties. After plaintiff's graduation from law school he returned to the home of his parents in Warrensburg, New York. Thereafter the testimony indicates that he performed many services in connection with the various interests and properties of his parents until his father's death in 1938. However in connection with at least one enterprise he received a salary, and in addition he was engaged in the practice of law, and a member of the Assembly for many years. After his father's death he continued to act for the defendant, his mother, in various matters. His father left by will his entire

estate to the defendant and plaintiff acted as her attorney, she being the executrix thereof.

In his bill of particulars plaintiff alleged that the oral agreement referred to provided in effect that he and his sister would share equally in all distributions made either before or after death in the property and estates of his father and mother. We do not find any testimony either by him or on his behalf which sustains this enlarged scope of the alleged agreement, and the Referee did not so find. The finding is simply that "both agreed that upon the death of either or both of them, the plaintiff would receive one-half of their estate, or both estates." This finding squares with the testimony of the plaintiff. The importance of this lies in the fact that whatever may be said as to the validity of the alleged agreement it was, on the plaintiff's own testimony, simply an agreement to make a will in his favor for one-half of the parents' estate. The only will set forth in full in the record is that of the defendant which she made on July 21, 1953, by the terms of which she left legacies of $7,000 to each of her two grandsons, directed the cancellation of a $10,000 note made by the plaintiff to her, and then divided her residuary estate equally between the plaintiff and his sister. Thus it would seem, irrespective of any question of fact as to the making of the alleged oral agreement or its legal validity, defendant subsequently complied with the very agreement which the plaintiff claims.

Defendant denies that the alleged oral agreement was ever made but in any event this question is not the real issue involved in the case. The real issue is whether plaintiff, acting both as an attorney and as a son, obtained from his mother the possession of stocks and bonds under circumstances that amounted to undue influence and overreaching on his part. We cannot find from the record any evidence that defendant was legally obligated to transfer to the plaintiff any of the securities involved in either

the plaintiff's claim or the counterclaim of the defendant, and such being the case the transfers involved take on the aspect of gifts. A gift of course, requires no consideration but on the other hand when questioned it must be shown to have been freely and voluntarily made. Where a confidential relationship exists between parties a valid gift must be established by evidence that is clear and satisfactory. Where parties do not deal on terms of equality it requires but slight evidence to shift to the donee the burden of proving by clear and satisfactory evidence that any transfer of property in question was free and voluntary on the part of the donor. (Starr v. Vanderheyden, 9 Johns. 253; Snook v. Sullivan, 53 App. Div. 602, affd. 167 N.Y. 536; Gick v. Stumpf, 126 App. Div. 548; Cassidy v. Cassidy, 285 App. Div. 1040.)

In the light of these simple principles we think the plaintiff failed to sustain the burden which was cast upon him by the confidential relationship that existed between him and his mother, and we reach this conclusion wholly from his own testimony. He obtained possession of the securities, which are the subject of his claim and also include those which are the subject of the defendant's counterclaim, by opening the defendant's safe deposit box by force. It is true that he had her written consent to do so, but this consent must be viewed in the light of the circumstances under which it was obtained. This happened in 1953 when defendant was about 80 years of age, and after she had been ill and confined in a nursing home. After she left the nursing home she went to the home of the plaintiff sometime in September, 1953. There a conversation ensued between herself and plaintiff concerning $40,000 worth of stock which was then in her safe deposit box in the Emerson National Bank in Warrensburg, N. Y. The parties disagree as to just what was said but in any event plaintiff obtained defendant's consent to open her box by force because she could not

locate the key to it, or didn't have it with her. Shortly after the opening of the box was forced and plaintiff took the securities into his possession she executed assignments of the securities that are the subject of the counterclaim herein. According to the testimony of the plaintiff himself she was at the time "somewhat vague and forgetful and uncertain about matters" and "her head seemed a little fuzzy."

Following this episode defendant executed while she was in Florida the bill of sale under which the plaintiff claims. This instrument was executed, according to the testimony of the plaintiff, after a discussion with the defendant concerning certain real estate which she had conveyed to the plaintiff's sister. It was drafted by a Florida attorney for the plaintiff but it is not claimed that the defendant was in any way represented by such attorney at the time. The bill of sale included all of the securities which plaintiff had removed from the defendant's safe deposit box and retained in his possession, except those which are the subject of her counterclaim and which she had previously endorsed or assigned to plaintiff.

From the whole record it appears that there was no financial discord between the plaintiff and defendant until some time in 1949. In that year plaintiff had apparently become resentful of gifts which defendant had made to his only sister and her children with whom the mother resided. There is no doubt that after the death of her husband the defendant from time to time made gifts of property to both the plaintiff and his sister. The plaintiff himself was given a house and lot which he estimated to be valued at $10,000; some shares of stock in the Emerson National Bank and also 100 shares of General Electric; and in addition was forgiven an obligation to pay a note for $10,000. The Referee tartly observed in his opinion: "Apparently both children were endeavoring to strip the mother of her property." But the Referee was

convinced that the daughter had enriched herself out of property to the detriment of her brother, and had imposed her will upon the mother. The Referee then concluded that when the defendant was freed from the domination of the daughter she made gifts of the securities in question here to the son in order to make an equitable distribution of her property. We take it that the Referee decided the case in favor of the plaintiff upon the ultimate theory that the transfers in question were freely and voluntarily made by the defendant because of course it was beyond his power to compel an equitable distribution, or as a matter of fact to make any finding with reference thereto. There is no proof in the record as to the value of any prior gifts made by the defendant to the daughter except that they did not equal those made to the plaintiff. We have no doubt that the Referee intended to equitably dispose of a distressing situation, and indeed it might be found that the plaintiff himself fully believed that he was entitled on an equitable basis to the securities in question but these matters are irrelevant to the decisive issues in the case, or at least have only a subordinate bearing upon them.

It is clear that the defendant had no legal obligation under the alleged oral agreement or otherwise to give the plaintiff anything during her lifetime. He, on the other hand, was bound by the highest punctilios of honor, in view of the fact that he was acting for the defendant both as her son and as her attorney, to see to it that the defendant was meticulously advised as to her rights and duties. That burden became his from the very nature of the confidential relationship that existed between them, and especially in view of her age and condition. As we have heretofore indicated we think he failed to sustain that burden. By his own admission he advised her on several occasions that there was a valid and subsisting agreement on her part to convey to him one-half of her

property. There is no indication that he limited this advice to the proposition that she had agreed to make a will in his favor. Although from his own observation she appeared to be vague and forgetful about matters he never suggested independent counsel either by way of business or legal advice. While the undertones of the record reveal a fued between plaintiff and his sister the lawsuit has to do of course with the rights of the defendant. Even if it should be found that the sister had unduly enriched herself from the defendant's estate that would not justify plaintiff from overreaching where he was acting as an attorney as well as son.

The judgment should be reversed and an order made directing judgment dismissing the complaint and granting the relief prayed for in the defendant's counterclaim.

APPENDIX G

Opinion of Official Referee.

STATE OF NEW YORK, SUPREME COURT,
WARREN COUNTY.

(Same Title.)

Appearances:

McPhillips, Fitzgerald & McCarthy (C. E. Fitzgerald and Thomas J. McCarthy of counsel), attorneys for plaintiff.

Morris, Dillon, Rezzemini & MacHarg, attorneys for defendant.

HEFFERNAN, O. R.:

This is an action by plaintiff against defendant to compel her to transfer to him certain stocks and bonds having a value of approximately $45,000.00 and a counterclaim by defendant to require plaintiff to return to her certain stocks of the value of about $40,000.00.

Plaintiff's action is based on the fact that defendant made a bill of sale to him of the stocks and bonds in question. Defendant as a defense asserts that her signature to the bill of sale and the prior transfer to him of the other stocks was obtained by undue influence, coercion and breach of the canons of legal ethics.

The record presents a tragic and distressing picture. Plaintiff is a lawyer and the son of defendant and her husband who died in 1938. Plaintiff and a sister, Mrs. Beswick, are the only children of their parents. Plaintiff graduated from Union College in 1921 and Albany Law School in 1924. He resides and practices his profession in Warrensburgh. Defendant and her husband, until the latter's death, resided in Warrensburgh. The husband was president and cashier of Emerson National Bank and president and treasurer of Schroon River Pulp & Paper Company. Defendant and her husband had substantial interest in the Paper Company and extensive real estate holdings. After the death of her husband defendant continued to make her home in Warrensburgh but spent about seven months of each year in Florida. Several years ago she disposed of her home in Warrensburgh and since then, when not in Florida, has lived with her daughter in Glens Falls.

It is plantiff's contention that in 1924 he had a conference with his father and mother in which they requested him to return to Warrensburgh after his graduation from law school and work under his father's direction in connection with the various enterprises in which they were interested and that if he did so they assured him that upon their deaths he would receive one-half of their estates. Plaintiff asserts that he assured his parents he would act in accordance with their request and that he did so not only during his father's lifetime but continued to act for his mother for many years thereafter. In his testimony

he states in great detail the services which he performed for both parents.

After the death of her husband defendant made from time to time distributions of her estate between plaintiff and her daughter and she continued to do so until 1952. Apparently both children were endeavoring to strip the mother of her property.

On many occasions plaintiff complained to his mother that the gifts to his sister and her children far exceeded those made to him. It would serve no useful purpose to discuss all these transactions.

I am convinced that the daughter has enriched herself out of her mother's property to the detriment of her brother. But for her acts, conduct and greed this lawsuit would never have arisen. The daughter imposed her will upon her mother. The latter when freed from the domination of the former made the gifts in question to her son in order to make an equitable distribution of her property. Undoubtedly she was motivated to do so out of natural love and affection and in order to appease her own conscience.

A reading of the record and the briefs of able counsel on both sides has confirmed the impression which I formed at the trial that the plaintiff is entitled to succeed. Because of the relationship of the partes I have felt it to be my duty to scrutinize their dealings with each other with extreme care.

If the parents of plaintiff made the agreement with him which he claims it is not an enforceable obligation—merely a moral one.

I cannot escape the conviction that the bill of sale which is the subject of this action was made and executed by defendant freely and without undue influence, coercion or duress on the part of plaintiff and that the securties which

are the subject of defendant's counterclaim were freely transferred by defendant to plaintiff without any taint of improper conduct on his part.

Plaintiff is therefore entitled to judgment for the relief demanded in the complaint and for a dismissal of the counterclaim, all without costs to either party.

Plaintff may submit findings of fact, conclusions of law and judgment in accordance with these views. All papers are herewith returned.

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IN THE

Supreme Court of the United States

October Term, 1965.

No. 819.

HARRY A. REOUX,

Petitioner,

v.

THE FIRST NATIONAL BANK OF GLENS FALLS (as Executor of the Estate of ADELIA H. REOUX, deceased),

Respondent.

Brief in Opposition to the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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THE REPORTER COMPANY, INC., Walton, N. Y. 13856—865-4131—1966

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